IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 301

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,

*Petitioners,*

vs.

THE CONGRESS OF RACIAL EQUALITY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT


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No.

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,
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THE CONGRESS OF RACIAL EQUALITY,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. H. Douglas and Mrs. Aubrey McGehee, appearing in her own proper person and as representative and next of kin of her husband, Aubrey McGehee, deceased, two of the Appellees in the Court of Appeals below, and R. Gordon Burt, Jr., the newly elected and qualified Mayor of McComb City, Mississippi, pray that a Writ of Certiorari issue from this Honorable Court to review the judgment and order of the United States Court of Appeals for the Fifth Circuit hereinafter set out in Section B of this petition.

A.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in F.2d . A copy of said opinion is appended.[1]

B.

## JURISDICTIONAL GROUNDS

(i) The judgment sought to be reviewed was dated the 15th day of May, 1963 and was entered on the same date. The judgment was issued as the mandate of the Court of Appeals to the District Court on the 10th day of June, 1963. A copy of said judgment is appended.[2]

(ii) No petition for rehearing was filed and no order respecting a rehearing was entered. No order granting any extension of time within which to petition for certiorari was sought or entered.

(iii) This court has jurisdiction to review the judgment in question by writ of certiorari under the provisions of 28USC § 1254(1) and § 2101(c).[3]

C.

## QUESTIONS PRESENTED

1. Are the guarantees of First Amendment to the Constitution so absolute as to require a Federal Chancellor to await an actual physical breakdown of local police and peacekeeping authority before exercising his discretionary

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1. See Appendix, Page A8.
2. See Appendix, Page A6.
3. See Appendix, Pages A1-A3.

authority to partially restrict further or continued demonstrations against local customs and practices?

2. Does the judgment of the Court of Appeals for the Fifth Circuit abridge Rule 52(a)[4] of the Federal Rules of Civil Procedure and in conflict with this court's decisions in *U. S. v. National Association of Real Estate Boards*, 339 U.S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950); *U. S. v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1273 (1955); *International Boxing Club v. U. S.*, 358 U.S. 242, 79 S. Ct. 245, 3 L. Ed. 2d 279 (1959)?

3. Is the judgment of the Court of Appeals contrary to this court's decision in *Hague v. C.I.O.*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939)?

D

## PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Because of the length of the provisions involved, their citation alone is set out at this point and their pertinent text is set forth in the appendix.[5]

**The Constitution of the United States:**

Amendment I.
Amendment IX.
Amendment XIV.

**United States Code:**

Title 28, § 1254(1), Certiorari Jurisdiction
§ 2101(c), Review on Certiorari.
§ 1332, District Court Jurisdiction.

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4. See Appendix, Page A5.
5. See Appendix, Pages A1-A5.

§ 1343(4), District Court Jurisdiction.
§ 1291, Court of Appeals Jurisdiction.
§ 2072, Rule Making Authority.
Title 42, § 1985(2) and (3), Conspiracy to Interfere with Civil Rights.

**Federal Rules of Civil Procedure:**

Rule 52 (a).

F.

## STATEMENT OF THE CASE

1.

### Jurisdiction

Jurisdiction was vested in the court of first instance under Title 28, *U.S.C.*, § 1332.

There was a diversity of citizenship between petitioners, who are citizens of the State of Mississippi, and THE CONGRESS OF RACIAL EQUALITY, which is a corporation incorporated under the laws of the State of New York. All of the proof by way of verified pleadings, affidavit and oral proof indicates that the John Doe defendants who were never served with process were citizens of states other than Mississippi.

The Complaint alleged wilful, intentional, deliberate action on the part of the defendants. These allegations would certainly support a claim by petitioners for punitive as well as actual damages under their prayer for general relief. In this status of the pleadings, a good faith claim was presented which met the jurisdictional amount requirement. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938).

The court of first instance also had jurisdiction of this cause under Title 28, *U.S.C.*, §1343. Title 42, *U.S.C.*, §1985(2) and (3), is violated whenever two or more persons conspire for the purpose of depriving any person directly or indirectly of the equal protection of the law or of equal privileges and immunities under law, and whenever they so conspire to prevent or hinder the duly constituted authorities of a State from giving or securing such equal protection of the laws to all persons under their jurisdiction. The respondent corporation was charged with formulating and carrying on a plan to foment violence and breaches of the peace in McComb to attract attention to itself. The proof is abundant and uncontradicted that their activities did actually hinder the rule of law in McComb to the detriment of petitioners.

District courts have original jurisdiction of any action authorized under §1985 of Title 42, *U.S.C.*, to recover damages or to secure equitable or other relief. Title 28, *U.S.C.*, §1343(4).

The utilization of a Writ of Injunction to protect rights encompassed within Title 42, §1985 (2) and (3) has been approved. *Brewer v. Hoxie School District*, (C.A. 8th, 1956) 238 F.2d 91.

2.

**Pleadings and Proceedings**

Petitioners filed a sworn complaint on the 2nd day of December, 1961 (T. 2), alleging that the Respondent, The Congress of Racial Equality—CORE, *a corporation incorporated under the laws of the State of New York*, was sponsoring, financing and encouraging persons to come to McComb City, after publishing their intention so to do, in order to foment violence and provoke breaches of the peace

in and around the bus and rail terminal facilities in McComb City.

On the same date Petitioners moved the Court for the issuance of a Temporary Restraining Order Without Notice (T. 8). This motion was supported by the affidavit of William A. Wiltshire (T. 11). The affiant, who was the City Attorney and a resident citizen of the municipality, averred that persons named therein who had been identified in the press, radio and television media as members of CORE, had come to the Greyhound Bus Terminal and, after giving false information as to their plans, appeared at the bus station in the presence of a belligerent crowd approximately one-half hour earlier than the police were advised they would. He further averred that while these persons were in the terminal they unnecessarily, rudely and violently beat upon the counter of the restaurant in the terminal and spoke and shouted in loud and boisterous language and that their actions provoked a breach of the peace therein. Affiant stated that these actions were done with the knowledge and intent of creating disturbances and provoking violence and breaches of the peace in the absence of police officials (T. 12).

A temporary restraining order enjoining the Respondent Corporation, CORE, from continuing to sponsor, finance or encourage persons to utilize the terminal facilities for the purpose of fomenting violence and provoking breaches of the peace in or near said facilities, was issued at 4:00 o'clock p.m. on the same date by District Judge Sidney C. Mize (T. 15).

On the same date Petitioners filed a Motion for Preliminary Injunction noticing the same for hearing on Thursday, December 7, 1961 (T. 7), at which time it came on to be heard.

At the commencement of the hearing on the Motion for Preliminary Injunction on December 7, 1961, Respondent filed (1) a Motion to Stay because of the pendency of the three-judge Federal Court action in *United States v. Mayor and Selectmen of McComb City*, Civil Action No. 3215 in said District Court (T. 21); and (2) an application for the convening of a statutory three-judge court pursuant to §§ 2284 and 2325 of Title 28, *U.S.C.* (T. 23).

During the course of the hearing on the preliminary injunction, Petitioners called five witnesses on direct examination and called Thomas Gaither, a salaried field representative of the Respondent Corporation, for cross-examination as an adverse witness. The affidavit of William A. Wiltshire was also introduced in evidence under a ruling reserving to the Respondent the right to call Wiltshire, who was present in the courtroom, for cross-examination (T. 54). At the conclusion of Petitioner's proof, CORE offered no proof but filed two additional unsworn motions and rested (T. 215). One was a Motion to Dismiss the proceedings for failure to state a claim upon which relief could be granted (T. 17); the other was styled, "Motion to Dissolve Temporary Restraining Order and Statement in Opposition to Motion for Preliminary Injunction" (T. 25). Both these motions attacked the court's jurisdiction and alleged the injunction prayed for would abridge constitutional liberties and be a burden on interstate commerce.

Only routine appellate procedures of briefs and oral argument occurred in the Court of Appeals. That Court's judgment and mandate is appended.[6]

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6 See Appendix, Page A6

3.

## Statement of Facts

McComb City, Mississippi, has a population of approximately 14,500. In November, 1961, it employed a total of fifteen active police officials on all shifts (T. 59). On the 28th day of November a Preliminary Injunction was served on the City in Civil Action No. 3215, *United States v. Mayor and Selectmen of McComb City* (T. 59). On the same date, Jerome Smith, the "Chairman of the New Orleans CORE" telephoned Thomas Gaither, the field representative of the corporation in Jackson, Mississippi, to inform him that a New Orleans CORE group would travel to McComb by bus (T. 159). On Tuesday evening, November 28, 1961, Jack Quigley, an Agent of the Federal Bureau of Investigation, called George Guy, the Chief of Police of McComb, Mississippi [a police officer of 25 years' experience (T. 209)], and told him that CORE was planning to send a group of people to the McComb bus terminal from New Orleans (T. 204, 5). The group of which Jerome Smith was a member arrived in accordance with Mr. Quigley's information (T. 205). Three hours before the arrival of Jerome Smith and his group radio, television and newspapers had announced their anticipated arrival (T. 68) and during the early part of that morning a number of newsmen had come into McComb from as far away as Atlanta, Georgia (T. 69, 70). Prior to the time of the Smith group's arrival a gas leak developed in the cafe in the bus station and it had been cleared of people (T. 73), but there were groups of people standing at some distance East and West of the Bus station (T. 73). When Smith and the others with him debarked from the bus they found the station closed and departed without incident (T. 74). Officials of the McComb Police Department were present

and had the crowd under control that morning (R. 76). The crowd was composed of members of both the white and negro races (T. 77). At about 2:00 p.m. on Wednesday, November 29, a disturbance occurred at the bus station involving a photographer (T. 75). During the progress of the investigation of that event, Federal Agent Quigley again contacted Chief Guy (T. 206) and advised him that he had been in touch with the Jerome Smith group and that they would go to the bus station at 3:20 or 3:25 p.m. and catch the 3:30 p.m. bus out of McComb (T. 207). When Agent Quigley talked with Chief Guy, the Chief advised him that he planned to have his police force present at the bus station at the time the Smith group planned to return (T. 210, 214, 5). Shortly before 3:00 p.m. Agent Quigley returned to the City Hall and advised Chief Guy that there had been a fight at the bus station and Chief Guy went there immediately. He found that the Smith group had come back about a half hour prior to their announced schedule (T. 207).

Immediately prior to the arrival of this group, Mr. McGehee, the operator of the restaurant in the Greyhound Terminal, was sitting outside of the restaurant talking to a man who identified himself to McGehee as a Television Cameraman from Station WDSU (T. 137). During the conversation, the Cameraman jumped up and ran to the corner where some negroes (the Smith group) were getting out of a car. He walked with them to the terminal. As the group started to go in the East door, which was formerly designated the colored waiting room, the cameraman motioned them to the other door on the West side, which was formerly the white waiting room, and told the Smith group to go into that door (T. 138).[7] McGehee

[7] All signs indicating any racially segregated use of the terminal had been removed previously in accordance with the Court's injunction in Cause No. 3215.

followed the group into the terminal building when they entered. They took seats at a counter and began to beat and knock on the counter and loudly demand service. One female in the group said loudly and fractiously (T. 144), "*Why in the hell can't we get service in here?*" The police were not present but another group of people were inside the terminal. McGehee thought violence would ensue (T. 142). He requested the Smith group to cease their agitation and to go to the other side of the terminal, that formerly had been designated as the "colored" waiting room (T. 141). At this point other persons in the terminal physically attacked the Smith group (T. 142).

When the police arrived, with the help of a loud speaker system, they brought the racially mixed crowd at the bus station under control. The crowd obeyed the orders of the police reluctantly, but without further fisticuffs or scuffling (T. 77). The Chief of Police and the Police Commissioner of the City attempted to locate the Smith group in order to secure aid in identification of the persons involved in the disturbance but the Smith group could not be found at that time (T. 85). Later that day, at about 6:00 o'clock p.m., they were contacted by the police but refused to prefer charges. The police continued to investigate the disturbance and subsequently arrested four men in connection therewith at about noon the next day (T. 86).

*For months prior to this incident members of the negro race had used the part of the terminal facilities designated for the use of whites without violence* (T. 143, 4). There had been racial disturbances between members of the white and colored races with regard to public schools in McComb prior to the time of this CORE-sponsored bus station incident, but CORE had received no publicity in connection with those situations (T. 169). On Wednesday

afternoon or Thursday morning (T. 126), Mayor Douglas talked with Assistant United States Attorney General Burke Marshall (T. 128) and told him that the City had decided it might be a violation of the injunction issued against them to place an officer inside of the station. Marshall nevertheless encouraged him to take this action (T. 129). In the course of their conversation, the Mayor said to Marshall, "If we can have these *publicized* movements discouraged and discontinued, it will be a lot of help to us in maintaining and keeping peace and order." "If Washington will use their influence, or what influence they have, to discourage that, it will be helpful." In reply to which Assistant Attorney General Marshall stated, "I'll do that today and call you back." In a return call Assistant Attorney General Marshall advised that he had had a telephone conversation with CORE's headquarters and that they had promised to discontinue these *publicized* movements (T. 131, 2). Evidently Marshall had also contacted CORE's Jackson field representative because that representative, Thomas Gaither, had given Jerome Smith of New Orleans the telephone number of Marshall in Washington, D. C. (T. 172). On Thursday, November 30, Assistant Attorney General Marshall anomalously wired the Mayor that his interpretation of the Court Injunction did not prohibit the McComb Police from patrolling the bus station premises, *provided their presence did not "have the purpose or effect of coercing racial segregation."* (Defendant's Exhibit #1) (T. 218). The City then decided to take the risk of placing uniformed policemen inside the terminal (T. 129). Correct compliance with the injunctive order was a matter of serious concern to the governing officials of McComb (T. 104, 123).

During the day on Thursday, the Associated Press Wire Service carried stories to McComb that the Smith

group, upon their return to New Orleans, engaged in meetings there and several of them were quoted in press interviews as stating that they planned to return to McComb on Friday from New Orleans on the 10:19 a.m. bus and from Baton Rouge on the 1:30 p.m. bus (T. 79). At approximately 11:00 a.m. Thursday morning, Gordon Carey, the National Field Director for CORE in New York called Gaither, the corporation's Field Director in Jackson, and instructed him to go to the Greyhound Station in McComb on Friday to meet expected bus passengers (T. 172, 3). Upon his arrival in McComb, Gaither called Doris Castle, a member of "our New Orleans CORE Group" to get the details of the time of arrival of the passengers he was supposed to meet (T. 175).

On Friday, Gaither went to meet the 1:30 p.m. bus and at his request the Assistant Chief of Police of the McComb Police Force reserved a place convenient to the station for Gaither to park. Chief Guy offered him an escort. Although Gaither testified that he had some fears or apprehensions for his safety, he stated that they were not due to anything on the part of the police—that his fear came from the presence of the crowds near the station (T. 179). When the group arrived they "used the facilities at the McComb bus station," then went to a restaurant to get something to eat, got back on the bus and left without incident (T. 185, 186).

On Saturday, Gaither again went to the bus terminal to pick up bus passengers. The evidence is conflicting as to whether any disturbance occurred in the terminal building (T. 190, 195-197). The evidence is also conflicting as to the extent of a disturbance at Gaither's car. He states there were several blows struck against the car for a matter of a minute until a police officer heard the disturbance and came to the car and stopped it (T. 190).

Officer Smith stated that only one blow was struck against the car and that he immediately went to the scene and told the person to move on. *The evidence shows without dispute that the city officials and police gave the best possible protection to the agitators during the entire period of the demonstrations. Neither the police nor any city official ever enforced or attempted to enforce racial segregation at or near the terminals and no race based orders were ever directed to those in or near the areas of disturbance, rather, the only function of these officials was to attempt to keep the militant crowds under control and to keep peace and order.* Except when they were misled as to arrival time, the police allowed the demonstrators the free use of the terminal facilities and kept the crowds away from them (T. 76-78, 89-90, 94, 129-130, 214-215).

The McComb Police Force had never had any difficulty in keeping peace and good order in McComb in the past (T. 213). During the period from Tuesday, the 28th day of November, 1961, until the issuance of the Temporary Restraining Order, in the words of the witness, Gordon, a newsman, and the City's Police Commissioner: "The people of the City were obviously greatly disturbed. They were reluctant to go about their ordinary business. The situation was extremely tense, explosive." (T. 92). Business in general in the community was seriously affected (T. 122) and Mr. and Mrs. McGehee were forced to abandon and close their private restaurant business (T. 146).

By Friday of the week of the demonstrations it was found necessary to increase the size of the police force (T. 213); by then every local policeman was on duty except one (T. 213). Off-duty policemen were used for extra duty on a double time basis until the Temporary Restraining Order took effect (T. 132, 3). Sheriffs, Deputy Sheriffs and State Highway Patrolmen had joined in as-

sisting the local police, which was a very unusual situation (T. 96). In the Police Commissioner's opinion, continued *publicized* demonstrations and agitation would have resulted in "chaos" and an "intolerable burden" would be placed on the local police force (T. 97).

The continuous burden placed on the City's small police force by these widely publicized agitations and demonstrations had existed for four days and nights before tensions were lifted by the District Court's Temporary Restraining Order required a temporary respite in *publicized* demonstrations and agitation. When the Temporary Restraining Order was issued the tense and explosive atmosphere in the community which had required 24-hour police surveillance, was tremendously improved (T. 95, 122), *although members of the negro race continued to use the terminal facilities* (T. 95).

F

## ARGUMENT

### Preliminary Statement

The fact subject matter of this petition includes the area of race relationships in Mississippi. One would be naive in the extreme to suppose that this issue does not provoke intense, albeit sometimes varying, reactions from the jurist as well as the ordinary man in the street. Petitioners feel it is imperative at the outset to state that the questions presented by this petition are *not* questions of segregation or unconstitutional racial discrimination or distinctions. The basic issues are (1) When does the government's peace-keeping responsibility permit the partial, temporary suspension of continuous demonstrations which have provoked burdens that threaten to exhaust its peace-keeping ability?; and (2) Does this court intend

to overrule its decision in *Hague* v. *C.I.O.*, *supra*, and create a new hybrid type of reverse derivative right in corporations to assert first amendment protections of individuals?

The fact that these issues arose against a background of racial unrest does not alter the basic legal issues.

## I.

## No Unconstitutional Abridgement of First Amendment Rights Resulted from the Issuance of the Preliminary Injunction

Although Petitioners respectfully submit that an examination of the record in this case discloses that the findings of fact by the District Judge were amply supported by the evidence and the logical and reasonable inferences to be deduced therefrom, no resolution of fact which is in dispute between the District and the reviewing court affects the legal error committed by the appellate court. (For convenience, the District Judge's order is appended hereto.[8]) Two judges of the Court of Appeals, after review of the cold record, held that this Federal Chancellor, who not only heard and observed the witnesses but was closest to the background and circumstances against which these agitations were cast, and who best knew, of any member of the Federal Judiciary, the realities of the racial situation in this community, had abused his discretion in granting a *very limited* preliminary injunction. He temporarily enjoined a corporation from continuing its sponsorship of the *publicized* use of rail and bus terminals in a beleaguered small town *after four consecutive days* of demonstrations which were accompanied by breaches of the peace, tension and intense peace-keeping difficulty.

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8. See Appendix, Page A37

The Circuit's majority opinion redetermined certain of the trial judge's preliminary findings of fact and came to the conclusion from "the whole record" that they would have acted differently if they had been invested with original and not appellate jurisdiction. The dissenting Court of Appeals' judge has completely documented the record facts upon which the district judge's opinion was based and, except to refer to this documentation, it will not be further discussed, because the stated differences in fact resolution do not control the legal issues.

With deference, we submit that the majority judges incorrectly interpreted this court's decision in *Edwards v. South Carolina*, No. 86 (Feb. 25, 1963) U.S. , 83 S. Ct. 680, L. Ed. , and took it to control the legal questions presented here.

With regard to the limited Preliminary Injunction, they stated:

> "We find that the injunction below is an unconstitutional abridgement of the First Amendment rights, as protected by the 14th Amendment, as a prior restraint on the freedom of speech . . .
>
> "The injunction, if allowed to stand, would amount to a *complete* deterrent to the members of CORE to peacefully demonstrate against the segregation policies of the City of McComb. (Emphasis added)
>
> "CORE and other organizations, organized for the purpose of peacefully demonstrating and speaking against unconstitutional state and local laws enforcing segregation would find themselves virtually inarticulate."

A word by word review of the entire record in this cause fails to furnish any basis for the last two statements. Nowhere is the purpose of the corporation, CORE's, organization even touched upon.

Agitators, who were encouraged by CORE to come into the City of McComb, came for the publicly announced purpose of using terminal facilities which had been in use on a racially integrated basis for many months prior to their arrival, and this integrated use continued uninterruptedly after the issuance of the injunction. The Preliminary Injunction Order specifically exempted travel for any lawful purpose and required the use of any facility at the terminal without regard to the race or color of the traveler. It simply temporarily lifted an intolerable burden which threatened the immediate breakdown of peace and order in an entire city from the shoulders of a small police force *after* long continued demonstrations had been protected to the best of the police force's ability. If there was ever a time when a point of clear and present danger had been reached, it was evidenced by the record in this case. But such a record is not necessary to constitute error on the part of the appellate review court. Actually, the purpose of a preliminary injunction is not to decide or prejudge the merits but to preserve the status quo until the rights of the parties may be fully determined by trial. *Miami Beach Fed. Savings & Loan Assn.* v. *Callender*, (5th Cir., 1958) 256 F.2d 410; *Weiner et al.* v. *National Tinsel Manufacturing Co.*, (7th Cir., 1941) 123 F.2d 96; cf. *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310, 60 S. Ct. 517, 84 L. Ed. 774. (1940). The proof is not required to be complete enough to demonstrate the right to a decree after trial in order to justify preliminary injunctive relief. *Duckworth* v. *James*, (4th Cir., 1959) 267 F.2d 224, cert. den. 361 U.S. 835; *Burlington Mills Corp.* v. *Roy Fabrics*, (D.C., S.D., N.Y., 1950) 91 F. Supp. 39, aff. (2nd Cir. 1950) 182 F.2d 1020.

Preliminary injunctive relief is available from a Court of Equity to maintain the status quo by restraining an act

contrary to equity and good conscience, especially when it is demonstrated that the applicant will be irreparably injured in the absence of such relief. *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500, 506-7, 79 S. Ct. 948, 3 L. Ed. 2d 988, (1959). Injunctive relief may be granted to prevent the improper or illegal use of public places. 43 *C.J.S.* 762-65, Injunctions, §§ 151-3 (cf. *U. S.* v. *Wood et al.*, (5th Cir., 1961) 295 F.2d 772, where a presumptively valid state criminal prosecution was enjoined by this same circuit because it would possibly have adverse effects on members of a community).

The public interest carries a great weight in the balance scale which the court is required to use in determining whether to grant or to withhold preliminary injunctive relief. 7 *Moore's Federal Practice* 1627, 8. Where grave questions are presented and injury to the complaining party would be certain and irreparable if the motion was denied and a final decree would be found not in favor, while the injunction, if it be granted, would not cause any considerable injury to the opposing parties, the injunction ought to be granted. *Meccano, Ltd., v. Wanamaker*, 253 U.S. 136, 141, 40 S. Ct. 463, 64 L. Ed. 822 (1920); *City of Miami Beach* v. *Benhow Realty*, (5th Cir. 1948) 168 F.2d 378.

With deference, we submit that the majority judges in the Court of Appeals not only were factually incorrect in their assessment of the record but were legally incorrect in making a redetermination of the facts, in view of the above authorities. This was certainly not the same situation as was presented in the *Edwards* case, *supra*. In the *Edwards* case *the first* demonstration was *in progress* on the grounds of the capitol where the legislature was convened when the *police*, acting under a *statute*, moved into halt the demonstration *entirely*. The only analogy to this

present matter was the fact the imminent threat to peace and order came from another group which resented the existence of the demonstration.[9]

After the lengthy period of continuous tension, which group threatened overt action was of as little consequence to the sleepless and exhausted police as it was to the legal issues involved.

We respectfully submit that the reviewing court's determination that the injunction constituted a "prior restraint" on free speech or assembly or demonstration or agitation is wholly unwarranted. Not only had this corporation not been restrained from assembling, speaking, demonstrating and agitating, *it had in fact been protected in the very acts of such speech, assembly, demonstration and agitation for four continuous days prior to the time that a Chancellor decreed that certain aspects of such demonstrations should be temporarily suspended.*

This case is unique in other respects. In all prior decisional law where a claim has been made that action amounted to unconstitutional restraint on freedom of speech or assembly, such complaints were bottomed upon the application of inflexible statutes or ordinances with the single exception of *Thomas* v. *Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945). In that case a restraining order was issued, without a hearing, *prior* to the time that the appellant spoke *and the restraining order was based upon the existence of a statutory requirement.* The court ex-

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9. Of course, the two groups had equal constitutional right to hold the personal views which caused the difference of opinion between them, even though neither had any right to break the proper criminal proscriptions on orderly conduct. *Shelly* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. 2d 441 (1948).

pressly confined its decision to the application of the statute.

This court has pointed out what common sense certainly dictates—that the fourteenth amendment's protection, even in first amendment areas, does not prevent the substitution of a Chancellor's Decree for a policeman's club. *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836 (1941). You have also declared that constitutional guarantees are not paramount to those reasonable exercises of the police power that are necessary to promote peace and good order. The court has often recalled the language of Chief Justice Hughes in *Cox v. New Hampshire*, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941):

> "Civil liberties, as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

Claimed violations of First Amendment rights have so often been before this court that it would be presumptuous to burden the court with numerous citations. For ease of reference to some of these cases, pertinent here, we would refer the court's attention to its majority and dissenting opinions in: *Edwards v. South Carolina, supra*, adding only the citation of *American Communications Assn. v. Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950); *Schenck v. U. S.*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); and *Beauharnais v. People*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952). Cf. *Dennis et al. v. U. S.*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), wherein the court stated:

> "Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature.

"If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."

In *Beauharnais* v. *People, supra*, the court emphasized the necessity for a thorough consideration of the historical background against which events were set in considering whether or not a statutory limitation on speech and assembly would be permitted. McComb City, Mississippi, is a relatively small southern community which, during the entire lifetime of its present residents, had followed the custom and practice of racial segregation. Earlier in the year racial demonstrations involving schools in the community had taken place heightening a tense situation. One day prior to the first of Respondent's actions the police force and officials of the city were enjoined to refrain from any law enforcement activities which might be construed as "seeking to enforce or coerce the segregation of the white and negro races in their use of terminal facilities used in interstate commerce."[10]

News media had exploited the local situation to the fullest. At this time and under these circumstances we submit that by the long continued and highly publicized provocative demonstrations the corporate respondent had finally placed itself outside of the ambit of reasonable free speech. As will be demonstrated below, the corporation, CORE, *which was the only appellant in the reviewing court*, had no constitutionally guaranteed right of speech

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10. In this connection, the city had determined that placing uniformed policemen with badges and guns inside the terminal facilities would constitute action which would be a violation of that injunction. This determination was in full accord with existing decisions of the Court of Appeals for the Fifth Circuit. *Baldwin* v. *Morgan*, (5th Cir. 1961) 287 F.2d 750, 757, and *Meredith* v. *Fair*, (5th Cir. 1962) 305 F.2d 343, 359

or assembly to petition. The trial judge was well within his area of discretion in determining to grant the very limited preliminary injunction.

2.

**The Court of Appeals Erred in Substituting Their Judgment for the Judgment of the Trial Court Judge on This Record**

A very limited issue presented itself for appellate determination. This was not an issue of the factual merits or demerits of the petitioners' claim for temporary injunctive relief. As demonstrated in argument under Point 1, the trial court was not reaching a decision on the merits of the controversy; it was not making an adjudication of any fact on the merits; it assayed only to make a limited decision as to whether equity required the preservation of the status quo on the basis of the sworn complaint, affidavit and testimony adduced before it. Its preliminary determinations nevertheless came to the Court of Appeals insulated by the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. We respectfully submit that in proceeding to their examination of the record the two-judge majority of the appellate court proceeded to redetermine the record facts and concluded that they would have reached a contrary decision. As previously stated, the errors and omissions in their fact analysis is completely documented by the dissenting circuit judge. We respectfully submit, however, that the majority judges' re-examination of the record as a matter of law conflicts with this court's decisions in *U. S. v. National Association of Real Estate Boards, supra; U. S. v. E. I. DuPont de Nemours & Co., supra,* and *International Boxing Club v. U. S., supra.*

For the very narrow purpose of determining whether a preliminary injunction should issue, we respectfully sub-

mit that the record is replete with fact documentation which supports the lower court's exercise of discretion.

3.

**The Rights Protected by the First and Fourteenth Amendments Are the Rights of Natural Persons, Not Artificial Corporations**

The only Appellant before the Court of Appeals was the corporation, CORE. This was not in anywise a class action and none of the individual defendants appeared in or appealed from the decision of the lower court. No suggestion was made in the Court of Appeals that any derivative rights were being asserted. In *Hague v. C.I.O., supra*, this court stated:

> "'Natural persons, and they alone, are entitled to the privileges and immunities which §1 of the Fourteenth Amendment secures for 'citizens of the United States'. Only the individual respondents may, therefore, maintain this suit."
>
> * * *
>
> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by § 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. Northwestern Nat. L. Ins. Co. v. Riggs, 203 U.S. 234, 255, 51 L. Ed. 168, 173, 27 S. Ct. 126, & Ann. Cas. 1104; Western Turf Assoc. v. Greenberg; 204 U.S. 359, 363, 51 L. Ed. 520, 522, 27 S. Ct. 384."

See also *Shelly* v. *Kraemer*, *supra*, footnote 9, *Communist Party* v. *Control Board*, 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961); *Adams* v. *City of Park Ridge*, (7th Cir., 1961) 293 F.2d 585; *International Ladies G.W.U.* v. *Seamprufe*, 121 F. Supp. 165 (1954); *The Constitution of the U. S.*, Corwin Ed. 1953, p. 809.

## CONCLUSION

This case is cast out of character if it be considered as a segregation controversy. It was long past that; it had devolved itself into a very basic peace-keeping issue and the primary determination which the trial judge was called on to make was whether or not basic constitutional rights of free speech required the officials of this municipality to continue to withstand the heavy peace-keeping burden provoked by these continuous publicized provocative demonstrations, which, at the time injunctive relief was granted, had progressed continuously for four days and were threatening to continue as long as the reaction of local individuals could be provoked.

We respectfully submit that not only was the trial judge's discretion not abused in temporarily calling a halt to the publicity aspects of these demonstrations, but a refusal to have imposed at least this stricture would certainly have been an abuse of his discretion.

This court should grant certiorari and review and set aside the judgment of the United States Court of Appeals for the Fifth Circuit issued the 10th day of June, 1963.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, the undersigned, CHARLES CLARK, of counsel for Petitioners, and a member of the Bar of the Supreme Court of the United States certify that a true copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT has been mailed air mail, postage prepaid to: Carl Rachlin, 280 Broadway, New York, New York; Derrick A. Bell, 10 Columbus Circle, New York, New York; and Lolis Elie, 2211 Dryads Street, New Orleans,

Louisiana, in accordance with the requirements of the rules of this Court, on this the day of , 1963.

CHARLES CLARK,
P. O. Box 1046,
Jackson, Mississippi.